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Brief of Wiley for D. C.

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Supreme Court of the United States

OCTOBER TERM, 1901.

No. 165.

LOUISA Y. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TOLLIVER, DECEASED, Plaintiff in Error,

vs.

THE STATE OF ALABAMA, Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Argument of A. A. Wiley, Gordon Macdonald and John D. McNeel, for Defendant in Error.

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Supreme Court of the United States

OCTOBER TERM, 1901.

No. 403.

LOUISA V. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TULANE, DECEASED, Plaintiff in Error,

v.

THE STATE OF ALABAMA, Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Argument of A. A. Wiley, Gordon Macdonald and John D. McNeel, for Defendant in Error.

This case involves the assessment of shares of stock in foreign corporations against resident owners. The only issue raised by the assignment of errors is that said shares of stock in foreign corporations should not be assessed for taxation, because it is said no similar taxes are imposed upon the shares of stock in like domestic corporations doing business in the State of Alabama. And it is contended that the laws imposing taxation

upon shares of stock in a foreign corporation are illegal and void under the XIV Amendment to the Constitution of the United States, which guarantees the equal protection of the law.

The assessments in this case were made under the revenue laws of the State of Alabama as contained in the Codes of 1886 and 1896, respectively. The particular sections of said Codes which are necessary for the consideration of this case are as follows:

"The following property and persons shall be exempt from taxation: 8. The shares of the capital stock of any company or corporation, which is required to list its property for taxation in this State, shall not be assessed against the shareholders of such company or corporation."

Code of 1886, Sec. 451.

"Every share of any corporation organized under the laws of this state, or any other state, or of the United States, (other than railroad, telegraph, express and sleeping car companies, building and loan associations, and banks and banking associations) to be assessed and collected in the county wherein such corporation has its chief or home office in this state, and to be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation.

Sec. 3911 of Code of 1896, Subd. 9.

This same subdivision proceeds to describe a method for assessing the shares, and also the corporate property, and for deducting the value of the corporate property from the value of the shares, so as to make the excess of values only taxable.

"All other property, real and personal, not otherwise specified herein, etc."

Sec. 3911 of Code of 1896, Subd. 14.

This latter, in which is set forth other subjects of taxation, is a general clause appearing in both Codes.

The section of the Code of 1886 above set out should be construed to exempt from taxation the shares of stock in only those corporations that list all or practically all their property for taxation in this state. Exemptions are contrary to the policy of the law, and so must be expressed in clear and unambiguous language. Had it been intended to exempt from taxation shares of stock in corporations that list any, or some, of their property for taxation in this state, it would have been so clearly expressed as not to be open to doubt. For this, we have the authority of this court as laid down in Sturges v. Carter, 114 U. S., 511. That case was appealed from the State of Ohio and involved the construction of a statute which exempted from taxation, as against the individual owners, shares of stock in corporations that list their property for taxation in that state. This court there said, "The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the state.—Jones v. Davis, 35 Ohio St., 474. This clearly means those corporations which are required to return all, or substantially all, their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio. If the Legislature had intended to allow an exemption in such a case, it could and would have expressed that purpose by words not admitting of a doubt. As the shares of the plaintiff in error in the Western Union Telegraph Company were not only not expressly, but not even by fair implication, exempted

from taxation, we are of the opinion that the tax complained of was authorized by law."

The evident intent and purpose, then, of the Legislature was to exempt from taxation shares of stock in only those corporations that list all their property for taxation in this state. These were exempted for that the value of the shares of stock in such corporations are indirectly diminished by taxation of the corporate property. But, it is said that the exemption of such shares of stock in such corporations, and the taxation of shares of stock in foreign corporations, is an invidious discrimination and in violation of the XIV Amendment of the Constitution of the United States. We are told that here we have people living in the same taxing district, one owning shares of stock in a foreign corporation, the other owning shares of stock in a domestic corporation, and that, under such circumstances, such shares of stock must be taxed alike, for that their positions, as regards the taxing laws of the state, are identical; that shares of stock, be they in a domestic or a foreign corporation, represent a certain value to the owners and should be taxed in proportion to that value. But, the property and franchises of railroads doing business in this state are elsewhere and otherwise taxed, and said taxation indirectly affects the value of the shares of stock. The same cannot be said of shares of stock in a foreign corporation, as its property and franchises are not subject to taxation by this state, and if such property is taxed at all it is by some other law over which this state has and cannot have any control. This state knows that the property and franchises of corporations doing business in this state are taxed and properly, but it knows nothing of the taxation of foreign corporations and consequently cannot be affected by the action of any foreign state.

Dwight v. Boston, 12 Allen, 316.

By taxing the property and franchises of corporations doing business in this state, the value of the shares of stock in said corporations are indirectly diminished. Should shares of stock in foreign corporations be exempted from taxation, as is contended for by plaintiff in error, their value would not be, directly nor indirectly, affected by the laws of this state. This, then, would be to discriminate against holders of shares in domestic corporations, and would be an invitation to the citizens of this state to invest their money in shares of stock in foreign corporations, to avoid the just claims of the state for taxation. It is true the shares of stock are identical in character, they are found in the same district, if you please, but the value of one is indirectly affected by the taxing laws of this state, and the two kinds of shares can be placed on equality, so far as the taxing laws of this state are concerned, only by directly taxing the shares of stock in foreign corporations and exempting from taxation shares of stock in corporations that list their property for taxation in this state.

In Pacific Express Company v. Seibert, 142 U. S., 339, it was contended that the Legislature arbitrarily defined what constituted an Express Company and imposed a tax on its business, while the same kind of business was permitted to be done by any person or company not included in the class defined without being taxed. The class was restricted "to persons or corporations that carry on a business of transportation *on contracts for hire with railroad or steamboat companies* doing business within the state," while a person or corporation who owned its own means of transportation might engage in the same business without being taxed. This court in that case said: "The legislation in question cannot be considered as invidiously discriminating

against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between companies defined by this act and railroad or steamboat companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock and other tangible property, as well as upon their franchise; and steamboat companies likewise pay a tax upon their tangible property." So here, we contend, there is an essential difference, so far as the purposes of taxation are concerned, between shares of stock in a corporation that pays taxes on its tangible property and shares of stock in corporations that pay no tax on their corporate property.

In Louisiana there is a statute exempting from taxation sugar refiners that limit their refining to the products of their own farm; all other refiners being taxed on their machinery. This was thought to be an unjust discrimination in favor of the small refiners and an infringement of the XIV Amendment. But this court held said act not in violation of said XIV Amendment. The court there said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the law to the less favored classes. But from time out of mind it has been the policy of this

government not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their produce on the market.

American Sugar Refining Company v. State of Louisiana, 179 U. S., 89.

And if there was an exemption here it might well be sustained on the theory that the state favored investments in public utilities doing business within her borders and thus contributing to her wealth. Such exemptions have been repeatedly sustained; they are not unreasonable.

M. & G. R. R. Co. v. Peebles, 47 Ala., 317;
S. & N. R. R. Co. v. Morris, 65 Ala., 193;
State R. R. v. Bd. of Rev., 91 Ala., 217.

In the case in 179 U. S. cited we have identical classes of property—one taxed, the other exempted from taxation. The *history* of the refineries was looked to for the discrimination, which was upheld. Yet, we have counsel *contra* citing and commenting on this case and elsewhere in his brief insisting that "In taxing identical classes of property, value can only be viewed, and the ratio of taxation must be the same on the valuation." And again counsel say: "Shares in railroads belong to the same class—they may be supposed identical in value—and both located in the same taxing district, by being attached to the domicile of the owner. How, then, can the legislature look into the history of the shares and class shares in foreign corporations having no property in this state for taxation and exempt shares in domestic railroads? Such a distinction has no relation to the object of the statute." So, too, the sugar refineries belong to the same class—they may be supposed identical in value—and both located in the same taxing district. How,

then, can the legislature look into the history of the cane used in said refineries and class refineries that are owned by non-producers for taxation and exempt refineries owned by producers? This is a distinction without a difference.

There is nothing in the XIV Amendment to forbid the classification of property for the purposes of taxation. The rule of equality only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Barbier v. Connally, 113 U. S., 29;
Kentucky R. R. Cases, 115 U. S., 321;
Bell's Gap R. Co. v. Penn., 134 U. S., 232;
Missouri Pacific R. Co. v. Mackey, 127 U. S., 205;
Missouri v. Lewis, 101 U. S., 22;
The Pacific Express Co. v. Seibert, 142 U. S., 339;
Giozza v. Tierman, 148 U. S., 657.

The only requirement is that such classification cannot be made arbitrarily.

It is said that "the accidents or incidents of corporation locality or the locality of corporation property do not afford any just rule of classification for discrimination in taxation." This is quite true, but unfortunately for the plaintiff in error it has no application to the facts of this case. The classification that is under consideration is not based upon location of corporate property. The two classes are as follows: Shares of stock in corporations that list (*all* or *substantially* all) their property for taxation in this state; and shares of stock in corporations that do not so list their property. It is not an arbitrary and invidious discrimination, but a

classification based upon an essential difference between said shares of stock as affected by the taxing laws of the state. We find, too, that a majority of the states have similar provisions and it is apparently the generally accepted theory of taxation.

The assessments that are being contested were, with the exception of the last year, made under the law as contained in the Code of 1886. The assessment for the last year was made under the Code of 1896. Whatever may be the opinion of the court as to the validity of the assessments made under the Code of 1886, the validity of the assessment under the Code of 1896 can not be affected thereby. For, as we shall hope to show, shares of stock in domestic corporations are not exempt from taxation under the Code of 1896, but are taxed just as are shares of stock in foreign corporations. Section 3911, subd. 9 of the Code of 1896, it is contended, exempts shares of stock in certain corporations from taxation—among which are railroad corporations. We might here say that the assessments in this case were made upon shares of stock in a foreign railroad corporation. That subd. 9 is as follows: "Every share of any corporation organized under the laws of this state, or of any other state, or of the United States, (other than railroad, telegraph, express and sleeping car companies, building and loan associations, and banks and banking associations) to be assessed and collected in the county wherein such corporation has its chief or home office in the state, and to be assessed at its actual market value to the person in whose name such share stands on the books of the corporation and not to the corporation." Said subdivision proceeds to set out a mode for assessing said shares and also the corporate property, and for deducting the value of the corporation's taxable property from the value of the shares, so as to make the

shares taxable only upon the excess of values. In this case before the Supreme Court of Alabama both sides contended that such bracketed exception was an exemption of shares of stock in said corporations *doing business in this state*, but the plaintiff in error further contended that the exemption also applied to shares of stock in said corporations—foreign as well as domestic—and the question submitted to the Supreme Court was whether or not shares of stock in such foreign corporations were exempted from taxation under said subdivision. The court held that exemption from taxation of shares of stock in a foreign corporation was not made by said section. The question of whether or not shares in such named domestic corporations were exempted, was not before the court and has never been presented and properly passed upon by the Supreme Court of this State.

To our minds it is clearly apparent that there is nothing in said subdivision that should be construed as an exemption of shares of stock of any kind whatsoever from taxation. If said subdivision does not in clear and explicit terms make an exemption of certain property from taxation, then it is the duty of the court to so construe it as to preclude an exemption. Section 3911 of the Code of 1896 sets out the various properties that shall be taxed and the modes of taxation of the different classes of property. Subdivision 9 merely sets forth the mode of taxing shares of stock in every corporation other than those included within the brackets. These latter are of course exempted from the peculiar manner of taxation as is set forth in this subdivision, and is an exemption to no further extent. In subdivision 8 of said section 3911, is set forth the particular mode of taxing shares of stock in banks and banking associations. Yet we find banks and banking associations included in the bracketed exception of subdivision 9.

Then, too, we find that shares of stock in building and loan associations are elsewhere specially taxed. Why, then, do we find these included in the bracketed exception of subdivision 9 if said bracketed exception is an exemption from taxation? Did the legislature, at the same time, tax and exempt from taxation certain classes of property? As aforesaid, the bracketed exception is merely an exemption from that particular mode of assessment as is set forth in said subdivision 9, and is not an exemption from taxation. This interpretation is by far the most reasonable, especially in view of the fact that the Code of 1886 had a subdivision, under the head of exemptions, which specially exempted from taxation shares in corporations whose property was listed for taxation in this state; but said subdivision is omitted from the Code of 1896. We have then two possible interpretations of subdivision 9 of section 3911. One reasonable and not in conflict with the general policy of the law; the other strained and directly opposed to general policy and therefore not to be favored. There can be no doubt which interpretation the court will adopt. As, then, there are no exemptions of shares of stock under the Code of 1896, the assessment of shares of stock in foreign corporations is not violative of any constitutional principle. If, as a matter of fact, shares of stock in domestic corporations are not assessed for purposes of taxation, the fault is not in the law but in the failure of the tax assessors properly to do their duties. And so we contend that the assessment under the Code of 1896 was valid, irrespective of the validity of the assessment for the years prior thereto.

The fact that the Code of 1886, Sec. 451, Subd. 8, exempts shares of stock in corporations required to list their property in this state is *not* an invidious discrimination against shares of stock in foreign corporations,

but such an exemption is perfectly within the power of the state.

This case presents a very grave question to the State of Alabama and to every other State in the Union. It is the unquestioned law that shares of stock have their situs at the domicil of the owner. If it be held that a resident of a state may invest all of his money in shares of stock or in corporations of another state, or in a foreign country, that he may escape taxation on his shares of stock there, because, by fiction of law this situs is at his domicil, then every man will so invest his money and the state of his domicil will be deprived of all revenue except from land or fixed property which cannot be moved.

We submit that the decision of the Supreme Court of Alabama is in consonance with common justice; is supported by the overwhelming weight of authority, and should be affirmed.

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